



Journal of Law and Social Policy

Volume 33 *Detained: From Supporting Prisoners to Abolishing Prisons*

Article 2

2020

Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities

Linda Mussell
Queen's University

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>



Part of the [Law Commons](#)

Citation Information

Mussell, Linda. "Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities." *Journal of Law and Social Policy* 33. (2020): 15-37.
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol33/iss1/2>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities

LINDA MUSSELL*

The recent National Inquiry into Missing and Murdered Indigenous Women and Girls (the National Inquiry) identified “the ongoing criminalization of Indigenous women as ... another iteration of residential schools or the Sixties Scoop.” Embracing these findings, this article aims to highlight the hidden and complex intergenerational and colonial nature of confinement for Indigenous Peoples in Canada. Inspired by a holistic approach used by certain Indigenous scholars, this article makes an argument for viewing imprisonment as a harmful colonial tool that has been used against Indigenous Peoples in different ways throughout colonial history. In other words, imprisonment in prisons follows in the footsteps of other forms of removal from communities, including residential schools, segregated hospitals, the Sixties Scoop, and ongoing child welfare system apprehensions. This article elucidates how the findings of the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls should be incorporated in future policy responses to this issue in Canada, arguing that solutions for intergenerational incarceration should centre Indigenous-led justice initiatives, and focus on intergenerational healing.

IN JUNE 2019, THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (the National Inquiry) identified the “ongoing criminalization of Indigenous women ... as another iteration of residential schools, or the Sixties Scoop.”¹ The National Inquiry states “... overrepresentation of Indigenous women in Canadian prisons is intimately tied to colonization, specifically through violence, poverty, and disruption of family and community life.”² This article builds on these findings to highlight the hidden and complex intergenerational and colonial nature of imprisonment for Indigenous Peoples in Canada.

* Linda Mussell is PhD Candidate in the Department of Political Studies at Queen’s University in Kingston, Ontario. She is a 2019-2021 Pierre Elliot Trudeau Doctoral Scholar and a 2017-2020 Joseph-Armand Bombardier CGS Doctoral Scholar. Her research critically examines intergenerational imprisonment in countries grappling with legacies of colonialism—Canada, Australia, and New Zealand. Her doctoral work builds on her experiences volunteering in inside and outside of prisons, and her other research on the justice system (including dangerous offender designation, emotion, memory, and repurposing of shuttered prisons).

¹ National Inquiry into Missing and Murdered Indigenous Women and Girls, “Reclaiming Power and Place: Executive Summary of the Final Report” (2019), online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf> [perma.cc/UZG6-N872] at 40 [National Inquiry, “Executive Summary”]. The National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry) had a mandate of looking into and reporting on the systemic causes of all forms of violence against Indigenous women, girls, and 2SLGBTQQIA (two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual). The Inquiry produced Final Reports and Calls for Justice to address the staggering rates of violence against Indigenous women, girls and 2SLGBTQQIA people.

² National Inquiry, “Reclaiming Power and Place: The Final Report, Volume 1a” (2019), online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg-ffada.ca/wp-

Intergenerational imprisonment, defined here as cycles of institutional confinement (not solely in prisons but in various settings) within generations of families and communities, is an under-recognized human rights and dignity issue which impacts Indigenous Peoples on a mass scale in countries that continue to grapple with colonial legacies. In Canada, provincial/territorial and federal governments are beginning to recognize this as a policy issue, following the recent National Inquiry report,³ and the Truth and Reconciliation Commission of Canada (TRC) reports,⁴ which called upon all levels of governments “to commit to eliminating the over-representation of Aboriginal people in custody over the next decade,”⁵ to “reducing the number of Aboriginal children in care,”⁶ and to “respond to the underlying causes of offending.”⁷ Indigenous organizations including the Native Women’s Association of Canada⁸ and the Assembly of First Nations (AFN)⁹ have asserted that current systems, including the justice and child welfare systems, are failing Indigenous Peoples, and immediate action is needed. Some criminologists have begun calling prisons the “new residential schools.”¹⁰

In this article I examine intergenerational imprisonment of Indigenous people in Canada, by (1) establishing a decolonial and holistic approach to the issue, (2) briefly illustrating how forms of imprisonment have shifted and persisted over time, (3) examining the gaps in existing literature, and (4) investigating gaps in policy responses and providing recommendations for transformative change. Inspired by a holistic and integrated approach employed by certain Indigenous scholars, I make an argument for viewing imprisonment as a harmful tool that has been used in different ways throughout colonial history. In other words, confinement in prisons follows in the footsteps of other forms of removal from communities, including residential schools, segregated hospitals, the Sixties Scoop, and ongoing child welfare system

content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> [perma.cc/BPR3-R626] at 635 [National Inquiry, “Volume 1a”].

³ *Ibid.*

⁴ Truth and Reconciliation Commission of Canada, *Canada, Aboriginal Peoples, and Residential Schools: They Came for the Children* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) [TRC: *They Came for the Children*]. In 2009, the Truth and Reconciliation Commission of Canada (TRC) began a multi-year process to listen to Survivors, communities, and others affected by the Residential School system in Canada. The TRC gathered statements and documents, and prepared reports on the legacy and impacts of the Residential School system. *They Came for the Children* is the initial report published by the TRC in 2012. The TRC published more extensive reports in 2015, along with ninety-four Calls to Action to redress the legacy of the schools and advance the process of Canadian reconciliation.

⁵ Call to Action #30. Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 3 [TRC: *Calls to Action*].

⁶ Call to Action #1. *Ibid.* at 1.

⁷ Call to Action #31. *Ibid.* at 3.

⁸ Native Women’s Association of Canada, “Human Rights” online: *Native Women’s Association of Canada* <www.nwac.ca/policy-areas/human-rights/> [perma.cc/FJF2-W3VS].

⁹ Assembly of First Nations, “Critical Federal Programs Failing First Nations Citizens: AFN National Chief Perry Bellegarde on Auditor General’s Fall 2017 Report” (22 November 2017), online: *Cision* <www.newswire.ca/news-releases/critical-federal-programs-failing-first-nations-citizens-afn-national-chief-perry-bellegarde-on-auditor-general-fall-2017-report-659343453.html> [perma.cc/57DH-NK46].

¹⁰ Nancy Macdonald, “Canada’s prisons are the ‘new residential schools’: A months-long investigation reveals that at every step, Canada’s justice system is set against Indigenous people” *Macleans* (18 February 2016), online: <www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/> [perma.cc/E5HC-ZLPD].

apprehensions.¹¹ Although these institutions are distinct and grounded in specific places and times, they feature commonalities including: (1) removal and isolation from communities, (2) use of coercion and force, (3) assimilative practices, and (4) resistance and resilience by Indigenous Peoples. I draw from and reply upon the perspectives of Indigenous scholars including Mohawk scholar Patricia Monture,¹² Ojibwe scholar Cheryle Partridge,¹³ Lakota scholar Maria Yellow Brave Heart,¹⁴ Ojibwe scholar Marlyn Bennett,¹⁵ and Māori scholar Linda Tuhiwai Smith,¹⁶ and additionally draw on the theory of non-Indigenous scholars Michel Foucault¹⁷ and Erving Goffman.¹⁸ As part of my analysis, I discuss the recommendations of the TRC, a commission which preceded the National Inquiry, and called upon the federal government to engage in systemic reform to respond to the issue of Indigenous disproportionate incarceration.¹⁹ The federal government should heed the TRC's recommendation for Indigenous-led justice initiatives, and place focus on ensuring intergenerational healing. With an overall goal of centering the focus on resilient people, communities, and nations,²⁰ I maintain that there is potential to create an improved future, and that potential is found in transformative change rather than reform.

I. APPROACH & THEORY

A. DECOLONIAL APPROACH

¹¹ Other forms of removal from communities that are not explored in this paper include displacement and confinement of Indigenous people to reserves, and the involuntary admission of Indigenous people to contemporary hospitals under psychiatric assessment. For a discussion of the parallels between the confinement of Indigenous people to reserves and incarceration, see Fran Sugar & Lana Fox, "Nistum Peyako Seht'wawin Iskewwak: Breaking Chains" (1989) 3:2 CJWL 456 at 469, 475. Prepared on behalf of the Native Women's Association of Canada for submission to the Task Force on Federally Sentenced Women. The title in Cree means "First Nations Women."

¹² Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3:1 CJWL 1. Monture (who passed in 2010) was a member of the Mohawk Nation from the Six Nations Grand River Territory.

¹³ Cheryle Partridge, "Residential Schools: The Intergenerational Impacts on Aboriginal Peoples" (2010) 7 Native Soc Work J 33. Partridge is from Wasauksing First Nation near Parry Sound, Ontario.

¹⁴ Maria Yellow Horse Brave Heart, "The Return to the Sacred Path: Healing the Historical Trauma and Historical Unresolved Grief Response Among the Lakota Through a Psychoeducational Group Intervention" (1998) 68:3 Smith College Studies in Soc Work 287. Brave Heart is a member of the Hunkpapa and Oglala Lakota.

¹⁵ Marlyn Bennett, *A Pilot Study Examining the Connection between Incarcerated Aboriginal Parents and their Children through Narrative Inquiry* (Winnipeg: Ka Ni Kanichichk Inc., 2015), online (pdf): <www.kanikanichichk.ca/wp-content/uploads/2017/07/Incarcerated-Aboriginal-Parents-and-Their-Children.pdf> [perma.cc/24S2-36R4]. Bennett is a member of Sandy Bay Ojibway Nation in Manitoba.

¹⁶ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London, UK: Zed Books Ltd, 1999). Smith affiliates to the Ngāti Awa and Ngāti Porou iwi.

¹⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Toronto: Random House, 1977).

¹⁸ Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, NY: Anchor Books, 1961).

¹⁹ I discuss disproportionate incarceration rates throughout this article. To clarify, I do not hold that there is an appropriate level of Indigenous incarceration, and I believe we should work towards a future where there are no Indigenous people behind bars.

²⁰ Elizabeth Fast & Delphine Collin-Vézina, "Historical Trauma, Race-based Trauma and Resilience of Indigenous Peoples: A Literature Review" (2010) 5:1 First Peoples Child & Family Rev 126.

The term “Indigenous” fails to reflect the distinctions among First Nations, Inuit, and Métis peoples in Canada, “who have their own histories, cultures, and languages.”²¹ “Indigenous” can be reductive, as people identify themselves as belonging to specific nations, each with a distinct name. For example, the Tyendinaga Mohawk Territory is the closest Mohawk Nation community to Queen’s University in south-eastern Ontario, where I work and live.²² I limit the use of the term “Indigenous ... to instances where a global term is appropriate,” and otherwise use distinct nation names.²³ I draw on examples and scholars from different nations that have experienced and resisted colonialism and imprisonment, although no single nation’s perspective is addressed in depth. I also refer to the term “Aboriginal” for consistency with the language used in some of the sources I consult.

Colonialism is not confined to history; it is an ongoing practice by the state and society that continues to this day.²⁴ For centuries,²⁵ colonial governments operating on the land now known as “Canada” have implemented policies in relation to Indigenous Peoples that sought to undermine Indigenous governance, rights, and treaties, and to further the process of assimilation.²⁶ Assimilation operates so that Indigenous Peoples “cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada.”²⁷ The TRC is clear in its conclusion that such practices constitute “cultural genocide,” which is the destruction of structures and practices integral to groups, including socio-political institutions, land-bases, languages, and spiritual practices.²⁸ The more recent National Inquiry report builds on the TRC’s finding, asserting that Canada has carried out and continues to carry out a genocide against Indigenous Peoples, particularly Indigenous women, girls, and 2SLGBTQQIA (two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual) people.²⁹ Colonial policies and practices disrupted Indigenous families and communities, preventing “the transmission of cultural values and identity” among new generations.³⁰ Iterations of such policies continue to the present day,

²¹ Panel on Research Ethics, “TCPS (2018) – Chapter 9: Research Involving the First Nations, Inuit and Métis Peoples of Canada,” online: *Government of Canada* <https://ethics.gc.ca/eng/tcps2-eptc2_2018_chapter9-chapitre9.html> [“TCPS (2018)”].

²² Mohawks of the Bay of Quinte, *Home*, online: <<http://www.mbq-tmt.org/>> [perma.cc/CJ3K-6UPV].

²³ TCPS (2018), *supra* note 21.

²⁴ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minnesota: University of Minnesota Press, 2014); Andrea Smith, “Not an Indian Tradition: The Sexual Colonization of Native Peoples” (2003) 18:2 *Hypatia* 70; Sherene H Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George,” in Sherene H Razack, ed, *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 127; Patrick Wolfe, “Settler colonialism and the elimination of the native” (2006) 8:4 *J of Genocide Research* 387.

²⁵ Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017).

²⁶ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 1 [TRC: *Honouring the Truth*].

²⁷ *Ibid* at 1.

²⁸ *Ibid*. See also, Andrew Woolford & James Gacek, “Genocidal carcerality and Indian residential schools in Canada” (2016) 18:4 *Punishment & Society* 400, who build on the TRC’s finding of “cultural genocide” by examining the concept of “genocidal carcerality.”

²⁹ National Inquiry, *supra* note 1 at 3; see the section on “Defining Genocide” at 2-4. The National Inquiry discusses colonial genocide at some length in its final report (National Inquiry, *supra* note 2), as well as in its supplementary report, “A Legal Analysis of Genocide,” online (pdf): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf> [perma.cc/TTL7-X5GW].

³⁰ TRC: *Honouring the Truth*, *supra* note 26 at 1.

resulting in high rates of confinement in prisons,³¹ and removal of children from families,³² among Indigenous Peoples in Canada. Importantly, throughout colonial history there has always been resistance, and Indigenous Peoples have continually sought to counter punitive and destructive colonial systems.³³

I seek to elucidate the shifting and persisting forms of imprisonment that the state has applied to Indigenous Peoples in Canada. I do this in a way that is cognizant of my positionality³⁴ as a settler, researcher, ally, and advocate with abolitionist politics,³⁵ born and raised on Coast Salish land,³⁶ and now based on Haudenosaunee and Anishinaabe territory in Kingston, Ontario. During my volunteer work and research with children of incarcerated parents on Coast Salish territory in British Columbia, the importance of this understanding of the varied and persistent forms of imprisonment was grounded. In the words of one participant from my prior research, “residential schools were the imprisonment of children.”³⁷ Such words speak to practitioner perceptions of the commonalities between residential schools and prisons, including the separation of family members by the state. I acknowledge that this work fits within a larger history of academic research which has not always approached Indigenous issues ethically, fairly, or fully. Following Smith’s vision, decolonial research means understanding the historical and current functioning of power in research, such as the power of labelling, essentializing, and alienating groups as “the Other.”³⁸ It also means seeking to make a positive difference regarding the issue at hand.³⁹ I seek to do so foremost by centering Indigenous voices and approaches, and supporting transformative solutions that flow from this knowledge.

B. HOLISTIC PERSPECTIVE

The view that imprisonment occurs in institutions other than prisons is not new. Foucault discusses the concept of the “carceral archipelago,” in which carceral power is found in multiple

³¹ Julie Reitano, “Adult correctional statistics in Canada, 2015/2016” (1 March 2017), online: *Statistics Canada* <www.statcan.gc.ca/pub/85-002-x/2017001/article/14700-eng.htm> [perma.cc/XX9V-3JTE].

³² Annie Turner, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under* (13 April 2016), online: *Statistics Canada* <www.statcan.gc.ca/pub/75-006-x/2016001/article/14547-eng.htm> [perma.cc/8K63-ADFV].

³³ Maura Hanrahan, “Resisting Colonialism in Nova Scotia: The Kesukwitk Mi’kmaq, Centralization, and Residential Schooling” (2008) 17:1 *Native Studies Rev* 25.

³⁴ Sandra Harding, “From the Woman Question in Science to the Science Question in Feminism” in Nico Stehr & Reiner Grundmann, eds, *Knowledge: Critical Concepts* (London: Routledge, 1983); Nancy C M Hartsock, “The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism,” in Sandra Harding & Merrill B P Hintikka, eds, *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (D Reidel Publishing Company, 1983).

³⁵ See e.g. Linda Mussell, “After the Prison Closes: Seeking Healing, Memory and Awareness at P4W” (2019) 28:1 *J of Prisoners on Prison* 66.

³⁶ In Surrey, British Columbia this includes Semiahmoo, Katzie, Kwikwetlem, Kwantlen, Qayqayt, and Tsawwassen Nations.

³⁷ Linda Mussell, *Kids on the Outside: Policy Options for Youth with Incarcerated Parents in British Columbia* (MPP Thesis, Simon Fraser University, 2016) [unpublished] at 31. A total of ten expert interviews were conducted with professionals in academia, federal and provincial agencies, and the voluntary sector: at 28. This insight emerged from one of my expert interviews: at 31.

³⁸ Smith, *supra* note 16 at 1-5,

³⁹ *Ibid* at 3-4.

institutions that isolate and seek to reform individuals.⁴⁰ Similarly, Goffman articulated the notion of the “total institution,” which manifests in forms other than the contemporary prison.⁴¹ The total institution seeks the destruction of an individual’s cultural identity and replacement with one determined by the institution.⁴² Traumatic experiences of isolation, institutionalization, and abuse, coupled with separation from family and culture, can create patterns of trauma.⁴³ Such trauma, alongside colonial structural inequities within the criminal justice⁴⁴ and child welfare systems,⁴⁵ go hand-in-hand with the institutionalization of Indigenous adults and their children.⁴⁶ The theoretical perspectives of Foucault and Goffman influence my analysis, in terms of acknowledging different locations of imprisonment and similarities between them. Foucault and Goffman are seminal critical voices whose works have traditionally been drawn upon in interrogating power and knowledge. Yet these voices are missing the critical insights found in works of Indigenous scholars that draw our attention to resilience, resistance, and autonomy. By placing these works side by side, I seek to draw attention to how Indigenous thought and action moves beyond these celebrated works.

Indigenous scholars assert the need for more holistic and integrated understandings of the outcomes of trauma. Brave Heart coined the term “historical trauma” in discussing intergenerational trauma among the Lakota people.⁴⁷ Historical trauma is defined as the consequences of numerous attacks that accumulate over generations and interact with other stressors to undermine the collective well-being of a people.⁴⁸ This concept has been drawn upon in the Canadian context, including by the TRC⁴⁹ and the National Inquiry.⁵⁰ Both reports also use the term intergenerational trauma, although to clarify, historical trauma is more commonly used to describe collective trauma experienced by a group that has a history of being systematically oppressed. Intergenerational trauma is more commonly used to refer to the transmission of trauma within specific families.⁵¹ The impact of historical trauma needs to be considered in the

⁴⁰ Foucault, *supra* note 17 at 297.

⁴¹ Goffman, *supra* note 18.

⁴² *Ibid.*

⁴³ Julia Rand, “Residential Schools: Creating and Continuing Institutionalization among Aboriginal Peoples in Canada Schools” (2011) 6:1 First Peoples Child & Family Rev 56 at 62.

⁴⁴ Chris Cunneen, “Colonial Processes, Indigenous Peoples, and Criminal Justice Systems” in Sandra Bucerius & Michael Tonry, eds, *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford: Oxford University Press, 2014).

⁴⁵ Raven Sinclair, “The Indigenous Child Removal System in Canada: An Examination of Legal Decision-making and Racial Bias” (2016) 11:2 The First Peoples Child & Family Rev 8.

⁴⁶ Rand, *supra* note 43 at 63.

⁴⁷ Brave Heart, *supra* note 14 at 288.

⁴⁸ Amy Bombay, Kimberly Matheson & Hymie Anisman, “The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma” (2014) 51:3 Transcultural Psychiatry 320 at 320.

⁴⁹ TRC: *Honouring the Truth*, *supra* note 26. Note that the TRC speaks to the concept of historical trauma generally, but does not name it directly.

⁵⁰ National Inquiry, “Executive Summary,” *supra* note 1; National Inquiry, “Volume 1a,” *supra* note 2 at 112. The National Inquiry, “Volume 1a” cites Brave Heart’s expert witness testimony, and speaks to historical trauma directly.

⁵¹ William Aguiar & Regine Halseth, *Aboriginal Peoples and Historic Trauma: The Processes of Intergenerational Transmission* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2015), online (pdf): <www.ccnsa-nccah.ca/docs/context/RPT-HistoricTrauma-IntergenTransmission-Aguiar-Halseth-EN.pdf> [perma.cc/22RV-UAME]. Aguiar and Halseth do not explicitly make this clarification between the two terms, but is clear from how they discuss both historical and intergenerational trauma. Note that the terms “historic” and “intergenerational” trauma are used interchangeably by other sources.

context of Indigenous People's historical and contemporary experiences of imprisonment in Canada. Partridge asserts that the impacts of colonization in Canada need to be understood in terms of historical trauma.⁵² In particular, she speaks from an Ojibwe cultural perspective about the intergenerational impacts of residential school on Indigenous people's mental, emotional, physical, and spiritual well-being using a medicine circle paradigm.⁵³ This paradigm is used by numerous Indigenous groups in North America, although its use and interpretation can differ.⁵⁴ Using this paradigm, she explains that a more holistic view must be taken to understand Indigenous experiences of trauma and resilience: Indigenous life before colonialism (the eastern doorway of the circle); colonial oppressive relationships (the southern doorway); Indigenous push for decolonization and respect (the western doorway); and ensuring survival of future generations (the northern doorway). I advance Brave Heart and Partridge's holistic conceptions of trauma and resilience—namely, viewing trauma as sustained intergenerationally, highlighting the harmful role of colonialism, and acknowledging the resilience and resistance of Indigenous Peoples in the face of generations of colonial policy and institutions.

II. IMPRISONMENT OVER TIME

Imprisonment of Indigenous people has occurred in different locations and moments in time in Canada, creating multiple sources of trauma but also generating multiple points of resistance and resilience. Imprisonment has taken place in multiple places including residential schools, segregated hospitals, the child welfare system, and prisons. Indigenous people's experiences within these institutions are distinct and not interchangeable. When looking at these institutions together, four common themes are revealed: (1) the removal of people from communities, (2) restriction of freedom and movement, and coercion by those invested with power to do so, (3) both visible and invisible rehabilitation to values determined by those who impose imprisonment, and (4) ongoing resilience and resistance.

A. RESIDENTIAL SCHOOLS

Residential schools were boarding schools for Indigenous children in operation from the 1880s to 1990s, funded by the federal government and run by Christian churches.⁵⁵ These schools featured: (1) the forcible removal of children from families, (2) the requirement that children remain in such institutions and follow a regimented schedule, (3) assimilative practices to suppress traditional values, language, and culture, and (4) both resistance and resilience by children, families, and communities. As the testimony gathered by the TRC revealed, children were taken from home communities to live in institutions "which felt like prisons," and they "were often treated as if they were offenders."⁵⁶ Julia Rand argues that the state furthered its assimilative aims by increasing children's vulnerability through removing them from their home

⁵² Partridge, *supra* note 13 at 51-54.

⁵³ *Ibid* at 35.

⁵⁴ Kelly J Beaulieu, "The Seven Lessons of the Medicine Wheel" (24 August 2018) online: *Say Magazine* <<https://saymag.com/the-seven-lessons-of-the-medicine-wheel/>> [perma.cc/6XWD-3WNP].

⁵⁵ TRC: *Honouring the Truth*, *supra* note 26 at 3.

⁵⁶ *Ibid* at 164.

communities and isolating them in residential schools.⁵⁷ Regarding restriction of freedom and the use of coercion, children were subjected to “strict discipline, religious indoctrination, and a regimented life more akin to life in a prison than a family.”⁵⁸ A former student of a residential school describes the school activities as “regimental ... it was like what I imagine jail to be.”⁵⁹ Children were subjected to physical, mental, and sexual abuse while at the schools, and were punished if they tried to escape.⁶⁰ Under section 11 of the 1884 *Indian Act*, children who left residential schools could be returned to the school against their will.⁶¹ The 1920 amendment to the *Indian Act* made residential or day school attendance compulsory for children who had Indian Status,⁶² and provided that parents who tried to keep their children home liable to prosecution, with both monetary fines and prison sentences on conviction.⁶³

Concerning rehabilitation to different values, Canadian residential schools were modelled on residential schools in the United States that had a central goal of indoctrinating children in settler culture.⁶⁴ Duncan Campbell Scott, Deputy Superintendent-General of the Ministry of Indian Affairs, famously remarked regarding the 1920 amendments to the *Indian Act*:⁶⁵ “Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the object of this Bill.”⁶⁶ In the face of colonialization, resistance has always been present. For example, the Mi-kmaq of Kesukwilt communities hid their children and alerted neighbouring communities if government agents were coming, and increased practices of transhumance (moving to other locations) to prevent children from being stolen.⁶⁷ Indigenous people’s carceral experiences in residential schools bear similarities to their experiences in other institutions that overlapped and followed, including the Sixties Scoop.

B. SIXTIES SCOOP

⁵⁷ Rand, *supra* note 43 at 58.

⁵⁸ TRC: *Honouring the Truth*, *supra* note 26 at 138.

⁵⁹ Linda Jaine, “Journeys,” in Linda Jaine, ed, *Residential Schools: The Stolen Years* (Saskatoon: University Extension Press, University of Saskatchewan, 1993) at 11.

⁶⁰ Truth and Reconciliation Commission of Canada, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 134-137 [TRC: *The Survivors Speak*]; John Leslie, “The Indian Act: An Historical Perspective” (2002) 25:2 Canadian Parliamentary Review 23.

⁶¹ *An Act further amend “The Indian Act, 1880,”* SC 1884, (47 Vict), c 27. See also Leslie, *ibid*.

⁶² *An Act to amend the Indian Act*, SC 1919-1920, c 50, s 10(1), available online (pdf): *National Aboriginal Document Database* <<https://epe.lac-bac.gc.ca/100/205/301/ic/cdc/aboriginaldocs/stat/pdf/1920jl01.PDF>> [perma.cc/K6DQ-Z5JS] [*Indian Act, 1920*]; Jennifer Anne Henderson & Pauline Wakeham, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013) at 69, 144, 318 (citing the *Indian Act, 1920*).

⁶³ *Indian Act, 1920*, *ibid*, 10(3). See also TRC: *The Survivors Speak*, *supra* note 60 at 13-16; Henderson & Wakeham, *ibid* at 318 (citing the *Indian Act, 1920*).

⁶⁴ Nicholas Davin, *Report on Industrial Schools for Indians and Half-Breeds* (Ottawa: Government of Canada, 1879); Rand, *supra* note 43 at 56-57; TRC: *Honouring the Truth*, *supra* note 26 at 55.

⁶⁵ *Indian Act, 1920*, *supra* note 63.

⁶⁶ Leslie, *supra* note 60.

⁶⁷ Hanrahan, *supra* note 33.

The “Sixties Scoop”⁶⁸ refers to “a child-welfare policy that removed Aboriginal children from their homes and placed them with non-Aboriginal families,”⁶⁹ from the 1950s to the 1980s.⁷⁰ The massive increase in the apprehensions of Indigenous children from the 1950s onwards is considered by the TRC as transferring children from one form of institution, residential schools, to another, the state-run child welfare system.⁷¹ This institution involved (1) the forcible removal of children from families, (2) the requirement that children remain in placed homes and follow the rules of foster or adoptive parents, (3) assimilative practices to suppress traditional values, language, and culture, and (4) both resistance and resilience by children, families, and communities. Regarding removal and isolation of the children, Rand argues that children taken into care were often isolated from their home community and placed with non-Indigenous families, which frequently had devastating impacts.⁷² As Jessica Hill illustrates, removal meant that “the traditional circle of life is broken.”⁷³ This could lead to a breakdown of bonds between parents and children, within families, and throughout communities. Concerning restriction of freedom and coercion, the child welfare system attempted to disconnect Indigenous children from their families with the intention that they bond instead with their foster families and connect with Eurocentric culture.⁷⁴ Regarding rehabilitation to different values, Monture underscores the importance of Indigenous culture and traditions to communities, and documents the ways child welfare institutions failed to respect and recognize this.⁷⁵ Resistance has always been present. Cathy Richardson and Bill Nelson note that despite the barriers created by the child welfare system, many children pushed back (*e.g.*, by attempting to return to birth families, and by seeking out their culture).⁷⁶

The end of the Sixties Scoop was marked by the introduction, in the 1980s, of new funding arrangements and provincial welfare legislative reforms acknowledging the importance of cultural identity to a child’s best interest. However, children continued to be removed from their homes in large numbers, and this later period is sometimes referred to as the “Millennium Scoop.”⁷⁷ In 2004, Gitksan activist Cindy Blackstock “estimated that three times as many Indigenous children were currently in the care of the state as were in residential schools during the peak enrolment period in the 1940s,” a continuity of removals following residential schools

⁶⁸ Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: Canadian Council on Social Development, 1983) at 23.

⁶⁹ TRC: *Honouring the Truth*, *supra* note 26 at 8.

⁷⁰ Johnston, *supra* note 68 at 24.

⁷¹ Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The History, Part 2: 1939 to 2000* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 147-149 [TRC: *The History, Part 2*].

⁷² Rand, *supra* note 43 at 63.

⁷³ Jessica Hill, *Remove the Child and The Circle is Broken: A Response to the Proposed Children’s Act Commission Paper* (Thunder Bay: Ontario Native Women’s Association, 1982) at 55. See also the decision in *Brown v Canada (Attorney General)* 2017 ONSC 251, a class action lawsuit on behalf of 16,000 survivors of the Sixties Scoop in Ontario, at paras 4-7 [*Brown*].

⁷⁴ Cathy Richardson & Bill Nelson, “A Change of Residence: Government Schools and Foster Homes as Sites of Forced Aboriginal Assimilation – A paper Designed to Provoke Thought and Systemic Change” (2007) 3:2 First People’s Child and Family Rev 75 at 77, 79.

⁷⁵ Monture, *supra* note 12 at 5.

⁷⁶ Richardson and Nelson, *supra* note 74 at 80.

⁷⁷ Jacqueline Marie Maurice, *The Lost Children: A Nation’s Shame* (Prospect, KY: Professional Woman’s Pub, 2014).

and the Sixties Scoop.⁷⁸ The number of Indigenous children currently in care has more recently been described by the Ontario Human Rights Commission as “staggering,”⁷⁹ and a growing child-welfare “crisis” by both the TRC⁸⁰ and the National Inquiry.⁸¹ Children’s experiences in the Sixties Scoop (and Millennium Scoop) bear similarities to the experiences of Indigenous people in other institutions, including segregated hospitals.

C. SEGREGATED HOSPITALS

Segregated hospitals were created in the 1930s⁸² through the 1960s⁸³ to differentially treat Indigenous people with tuberculosis in Canada. In the 1950s, the government moved some Inuit communities into settlements, and those who were displaced suffered a massive tuberculosis outbreak. For example, in 1964, over 70 per cent of Keewatin Inuit were placed in hospitals for periods ranging from three months to nine years. Together with this practice, children were removed from communities experiencing an outbreak and adopted into outside families without family consent or notice.⁸⁴ Segregated hospitals involved (1) the forcible removal of individuals from communities, (2) the requirement that patients remain in the institution and follow the rules of the institution, (3) assimilative practices to suppress traditional values, language, and culture, and (4) both resistance and resilience by individuals, families, and communities. Maureen Lux draws on historical texts to illustrate that the opening of segregated hospitals was an attempt by the state to define national health by isolating and institutionalizing Indigenous people.⁸⁵ The *Indian Act* was amended in 1953 to mandate the compulsory medical examination and treatment of Indigenous people, allowing for the detention and imprisonment of those who resisted.⁸⁶ In the words of Kathleen Steinhauer-Anderson, a Saddle Lake Cree nurse: “[m]ost of the patients demonstrated that sense of despairing resignation so evident at a residential school Goals seem to elicit somewhat the same response from native people familiar with such institutions.”⁸⁷ Mainstream treatment relied on extended stays that focused on a narrow Eurocentric ideal of “improvement and regulation of the self.”⁸⁸ Segregation was deemed necessary for this treatment of Indigenous people.⁸⁹ Throughout this history there was resistance. For example, there are

⁷⁸ Cited in Holly A McKenzie et al, “Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses” (2016) 7:2 *The International Indigenous Policy J*; see also Cindy Blackstock, Nico Trocmé & Marlyn Bennett “Child Maltreatment Investigations Among Aboriginal and Non-Aboriginal Families in Canada” (2004) 10:8 *Violence Against Women* 901 at 905.

⁷⁹ Ontario Human Rights Commission, *Interrupted Childhoods: Over-representation of Indigenous and Black children in Ontario child welfare* (Toronto: OHRC, 2018).

⁸⁰ TRC: *Honouring the Truth* *supra* note 26 at 138.

⁸¹ National Inquiry, “Volume 1a,” *supra* note 2 at 53.

⁸² Maureen Lux, “Care for the ‘Racially Careless’: Indian Hospitals in the Canadian West, 1920–1950s” (2010) 91:3 *The Canadian Historical Rev* 407 at 423, 427.

⁸³ *Ibid* at 408.

⁸⁴ Olive Patricia Dickason, *Canada’s First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 397.

⁸⁵ Lux, *supra* note 82 at 407.

⁸⁶ *Ibid* at 433.

⁸⁷ Donna Dryden et al, *The Camsell Mosaic: The Charles Camsell Hospital, 1945-1985* (Edmonton: Charles Camsell History Committee, 1985), cited in Lux, *ibid* at 434.

⁸⁸ Lux, *ibid* at 419.

⁸⁹ Stuart C Houston, *R G Ferguson: Crusader Against Tuberculosis* (Toronto: Hannah Institute, 1991).

accounts of children who defied bedrest orders having both legs set in plaster casts to prevent further dissidence, and adults having their clothing taken away to prevent them from leaving.⁹⁰ Indigenous people's experiences in segregated hospitals bear similarities to their experiences in other institutions, including confinement in prisons today.

D. PRISONS

Prisons (*i.e.*, correctional institutions, detention centres, jails, treatment centres) have confined Indigenous youth and adults on a mass scale since the 1960s. This institution exemplifies (1) the removal of individuals from communities, (2) the restriction of freedom and movement, and coercion by those invested with power to do so, (3) both visible and invisible rehabilitation to values determined by those who decide to impose imprisonment, as well as (4) resistance and resilience by prisoners. Prisoners are removed from home communities and isolated, not only in prisons generally, but often in segregation, as described by Indigenous women and former prisoners Fran Sugar and Lana Fox.⁹¹ The majority of the Indigenous women federal prisoners in the Prison for Women (P4W) interviewed by Sugar and Fox in the late 1990s were mothers, and they spoke of the impossibility of seeing their children inside, and the difficulty of maintaining parental relationships upon release.⁹² Regarding restriction of freedom and the use of coercion, Sugar and Fox document constraints within the prison (*e.g.*, inability to move freely) and arbitrary mass punishment (*e.g.*, strip searches).⁹³ Prisoners were expected to undergo treatment for the official rationale of rehabilitation, yet these services were often inappropriate and ineffective. For example, women prisoners were "treated" with men at the Regional Treatment Centre on the grounds of Kingston Penitentiary.⁹⁴ Lastly, regarding resistance, Indigenous women would push back and refuse to cooperate, including in cases of ordered strip searches by male guards in the institutions.⁹⁵

Overall, in the cases of these institutions, change and healing cannot occur on the inside. As Sugar and Fox state: "We cry out for a meaningful healing process that will have a real impact on our lives, but the objectives and implementation of this healing process must be premised on our need, the need to heal and walk in balance."⁹⁶ Such experiences and calls for change continue inside and outside prisons today.

The National Inquiry's final report featured a profile on incarcerated women, noting that "[o]ne of the reasons that Indigenous women are overrepresented in the Canadian prison population is that they experience violence at a disproportionate rate."⁹⁷ The report states that the "overcriminalization of Indigenous women is largely a result of colonialism, in and out of the penal system."⁹⁸ A further claim that can be made is that confinement is nothing new among generations of Indigenous people, and its full extent is hidden and lacks acknowledgment. As Sugar and Fox explain, in addition to the institutions profiled in this article, the conditions of

⁹⁰ Dryden et al, *supra* note 87, cited in Lux, *supra* note 82 at 434.

⁹¹ Sugar & Fox, *supra* note 11.

⁹² *Ibid* at 480.

⁹³ *Ibid* at 469, 472.

⁹⁴ *Ibid* at 469.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at 482.

⁹⁷ National Inquiry, "Volume 1a," *supra* note 2 at 636.

⁹⁸ *Ibid*.

prison echo the conditions of the reserve system, and the requirement of obtaining a permit to travel off-reserve.⁹⁹ Imprisonment has shifted and echoed over generations.

III. IMPRISONMENT TODAY

In the prior section I laid out a theoretical framework and examined past and ongoing imprisonment of Indigenous people using a holistic lens, to assert that there are similarities between them and highlight the importance of accounting for historical trauma and resistance. It is essential to name and acknowledge this history in order to understand current and persisting trends of imprisonment. Policy makers and bureaucrats collect some statistics related to the number of Indigenous people confined in prisons and apprehended by the child welfare system. Yet the data is imperfect, with many profound gaps. Further, policy decisions cannot be based on numbers and data without an understanding of the historical context, otherwise state solutions or responses will continue to perpetuate the institutional harm that generations of Indigenous people have experienced. There is also a concern that data will be used without considering the historical and enduring social context, to justify ineffectual solutions that continue to separate, confine, and assimilate Indigenous people. As Sugar and Fox argue, immediate and historical memories need to be understood in order to discern solutions that will allow for “healing instead of rage.”¹⁰⁰ Solutions must reflect the complexity of imprisonment and acknowledge the harm enacted by prior and continuing interventions.

With this context in mind, I turn to examine what contemporary statistics reveal about intergenerational imprisonment of Indigenous people in Canada. I examine available statistics, which help to illustrate the high number of Indigenous individuals affected by confinement in prisons and child-welfare apprehensions, but fail to fully capture the ways in which these forms of confinement interact. I then examine the literature, arguing that it fails to fully account for complex history and ongoing practices, and fails to link intergenerational imprisonment to colonialism. In the final section of the article, I examine policy and legal responses, arguing that there are significant gaps in these responses as they fail to embrace Indigenous leadership, ownership, and control. The intergenerational imprisonment of Indigenous people should not be viewed as an isolated trend, but rather as an ongoing pattern characterized by historical trauma that is rooted in multiple persisting institutional sites of imprisonment.

A. STATISTICS

The following section features statistics to provide background and underscore the need for the state to examine the history and ongoing imprisonment of Indigenous people in Canada, and the intergenerational nature of this injustice. While statistics are not complete on this issue, some insights can be gained regarding rates of Indigenous people incarcerated (confined in jails and prisons), of Indigenous children with incarcerated parents, and of Indigenous children in the child welfare system in Canada—shocking figures which must be situated in the context of colonial history. These statistics reveal that imprisonment of Indigenous people is not a thing of the past, but is continuously increasing, and they provide some limited insight into the

⁹⁹ Sugar & Fox, *supra* note 11 at 469, 475.

¹⁰⁰ *Ibid* at 469.

intergenerational and cross-institutional impacts of confinement. Arguably, trauma sustained through different forms of imprisonment interacts with unjust policy structures (as discussed in section III C, *infra*) to expose families and communities to even more institutional confinement. Yet statistics present an incomplete picture; there are gaps in what data has been deemed important to track, with insufficient attention paid to the connections between different forms of confinement over and within generations.

The AFN concludes that incarceration accounts for a large part of the gap in quality of life between Indigenous Peoples and settlers in Canada.¹⁰¹ Rates of Indigenous incarceration are disproportionate as compared to the percentage of Indigenous people in the general Canadian population. Statistics Canada reported that in 2017-2018, Aboriginal adults accounted for 30 per cent of provincial, and 29 per cent of federal, admissions, while representing just over 4 per cent of the Canadian adult population.¹⁰² The overrepresentation of Aboriginal adults was more pronounced for women, who accounted for 42 per cent of women admissions to provincial/territorial custody,¹⁰³ and 31 per cent to federal custody.¹⁰⁴ The comparable figure for Aboriginal men was 28 per cent of provincial/territorial custody,¹⁰⁵ and 23 per cent of federal custody.¹⁰⁶ Rates of Aboriginal imprisonment vary by region, and Statistics Canada data demonstrates that the number of Aboriginal people incarcerated is particularly disproportionate in Saskatchewan and Manitoba.¹⁰⁷

Statistics Canada reported that in 2017-2018, the majority of prisoners were under thirty-five years of age, which may mean it is more likely that they are parents to young children in addition to caring for other family or community members. In 2017-2018, adults under age thirty-five¹⁰⁸ accounted for 59 per cent of all adult prisoners in provincial/territorial custody and 53 per cent of all adult prisoners in federal custody.¹⁰⁹ This was an increase from 2015-2016.¹¹⁰ Statistics Canada did not provide data on the proportion of Aboriginal adults under age thirty-five, nor the proportion of Aboriginal adults who were parents or caregivers incarcerated, in 2017-2018. However, given the over-representation of adults under age thirty-five in the prison population, a reasonable extrapolation is that a significant proportion of Aboriginal prisoners may be parents of young children and caregivers. Aboriginal women may be impacted more significantly than Aboriginal men as imprisoned parents and caregivers, but there is no data on the proportion of incarcerated Aboriginal women who are mothers and/or caregivers available

¹⁰¹ Assembly of First Nations, “Closing the Gap: 2015 Federal Election Priorities for First Nations and Canada” (2015), online (pdf): *Assembly of First Nations* <www.afn.ca/uploads/files/closing-the-gap.pdf> [perma.cc/8C3K-HWPY].

¹⁰² Jamil Malakieh, “Adult and youth correctional statistics in Canada, 2017/2018” (9 May 2019), online: (*Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm>> [perma.cc/KMT4-GSM4].

¹⁰³ *Ibid.*

¹⁰⁴ Reitano, *supra* note 31.

¹⁰⁵ Malakieh, *supra* note 102.

¹⁰⁶ Reitano, *supra* note 31.

¹⁰⁷ Malakieh, *supra* note 102. Malakieh reports that in 2017-2018, Aboriginal adults made up 74 per cent of admissions to custody in Manitoba, and 76 per cent of admissions to custody in Saskatchewan.

¹⁰⁸ Confinement at this age may mean a separation from young children and also aging family members.

¹⁰⁹ Malakieh, *supra* note 102.

¹¹⁰ Reitano *supra* note 31. Reitano records that in 2015-2016, adults under 35 years old accounted for 58 per cent of admissions to provincial/territorial prisons, and 52 per cent of admissions admitted to federal prison.

from Statistics Canada. The proportion of incarcerated Aboriginal individuals with family members who have also been imprisoned is also not available.

Regarding the number of children with incarcerated parents, some startling yet dated figures are known. In 2007, a Correctional Service Canada (CSC) study estimated that 357,604 children, just over 4 per cent of all Canadian children under 19 years of age at the time, had been impacted by having fathers incarcerated in correctional systems.¹¹¹ The CSC study references a 1999 study, which examined a sample of four hundred and twenty six federally sentenced women admitted to a federal women's prison between 1 January 1996 and 1 March 1998. The 1999 study found that just over 80 per cent of the women were mothers of minors, suggesting that the number of children impacted by an incarcerated parent is higher than 4 per cent.¹¹² A total of 33 per cent of fathers in the study sample indicated that their partner or another family member had been convicted of a crime.¹¹³ Moreover, 9 per cent of fathers had at least one child under the age of eighteen who had been justice-involved (*i.e.*, in conflict with the law).¹¹⁴ Based on this data, the study authors estimated that the children of federally-sentenced fathers may be two to four times more likely than their peers to be justice-involved. I note that the data in the CSC study is more than ten years old, and does not capture the number of fathers confined in provincial jails, the numbers of caregivers of other family and community members confined in jails, nor the experiences of mothers who are incarcerated. This data is also not specific to Indigenous people. However, it partially illustrates the extent of the intergenerational impacts of incarceration, despite being hidden and unacknowledged in policy debates and broader discussions in Canada.

The number of Indigenous people who are incarcerated who have personal or family history with residential schools, segregated hospitals, and child apprehension in the family is not known exactly. From 1883¹¹⁵ until the 1990s,¹¹⁶ at least one hundred and thirty eight residential schools operated in nearly every province and territory in Canada, with the exception of Prince Edward Island and Newfoundland and Labrador.¹¹⁷ Approximately one hundred and fifty thousand registered children attended these schools.¹¹⁸ The number of individuals treated in segregated hospitals does not appear to be publicly available, although research may emerge in the future following recent news coverage and ongoing lawsuits.¹¹⁹ The number of children separated from their families due to segregated hospital treatment has also not been reported. During the Sixties Scoop, between 1964 to 1984, an estimated sixteen thousand children from Ontario alone were taken from their families and fostered or adopted by non-Indigenous

¹¹¹ Lloyd Withers & Jean Folsom, "Incarcerated Fathers: A Descriptive Analysis" (May 2007), online: *Correctional Services Canada* <www.csc-scc.gc.ca/research/r186-eng.shtml> [perma.cc/9RQW-BBEW].

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ TRC: *They Came for the Children*, *supra* note 4 at 16.

¹¹⁶ *Ibid* at 20.

¹¹⁷ *Ibid* at 114. The report features a table listing all the residential schools per province/territory, and there are one hundred and thirty eight in total: at 114. However, earlier in the report, the TRC states that there were at least 150 residential schools: at 1.

¹¹⁸ *Ibid* at 113.

¹¹⁹ Lauren Pelley, "Mistreated: The legacy of segregated hospitals haunts Indigenous survivors" *CBC* (29 January 2018), online: <www.cbc.ca/news/interactives/sh/jTCWPYgkNH/mistreated/> [perma.cc/XXZ9-BK9V]; Lauren Pelley, "\$1.1B class-action lawsuit filed on behalf of former 'Indian hospital' patients" *CBC* (30 January 2018), online: <www.cbc.ca/news/canada/toronto/indian-hospital-class-action-1.4508659> [perma.cc/PB5N-MFE7].

families.¹²⁰ Regarding the proportion of Indigenous prisoners who have experience as children-in-care, the Royal Commission on Aboriginal Peoples (RCAP) provides a glimpse. RCAP references a survey conducted by the Prince Albert Native Awareness Group of Indigenous prisoners at the Prince Albert Correctional Centre in Prince Albert, which indicated that over 95 per cent of the Indigenous prisoners in the centre had either been in foster care or in group homes.¹²¹ Yet this data from RCAP is a small snapshot, and nearly twenty-five years old. The lack of data means that the ongoing connections between generations of institutional confinement in Indigenous communities are mostly hidden.

The National Inquiry, during a visit to Fraser Valley Institution (a federal women's prison in British Columbia), heard from nine incarcerated Indigenous women, all of whom are residential school survivors. At the Joliette Institution (a federal women's prison in Quebec), most women shared "that their parents and/or grandparents had experienced severe trauma from residential schools and that this had a direct impact on their lives."¹²² Further, the National Inquiry report states, "[m]any women described to us their 'graduations' from foster care, to youth detention, to provincial institutions, to federal institutions."¹²³ This statement captures the reality that different forms of imprisonment can be experienced by one generation, as well as over generations, and the impacts are still unfolding for many Indigenous families and communities.

Concerning the ongoing "Millennium Scoop,"¹²⁴ involving children removed from their families and placed in foster care since the 1990s, few statistics are available on the history of those families' involvement in residential schools, segregated hospitals, child apprehension, or prisons. Statistics Canada reported that in 2011 there were more than fourteen thousand Indigenous children aged fourteen and under in foster care.¹²⁵ Only 7 per cent of all children fourteen and under in Canada are Indigenous, and yet Indigenous children accounted for nearly half (48 per cent) of all foster children in Canada in 2011.¹²⁶ The proportion of children in foster care who were Indigenous varied between different provinces and territories. A total of 76 per cent of Indigenous foster children lived in the Western provinces.¹²⁷ In Manitoba, 85 per cent of foster children were Indigenous; in Saskatchewan, 87 per cent of foster children were Indigenous.¹²⁸ Nearly all foster children in Nunavut, Yukon, and the Northwest Territories were Indigenous, although the proportion of children who are Indigenous in those territories is higher

¹²⁰ Brown, *supra* note 73 at para 14.

¹²¹ Royal Commission on Aboriginal Peoples (RCAP), *Vol. 3. Gathering Strength* (Ottawa: Minister of Supply and Services Canada, 1996) at 18.

¹²² National Inquiry, "Volume 1a," *supra* note 2 at 637.

¹²³ *Ibid* at 635.

¹²⁴ Maurice, *supra* note 77.

¹²⁵ Turner, *supra* note 32. See also Vandna Sinha, Ashleigh Delaye & Brittany Orav-Lakaski, "Reimagining Overrepresentation Research: Critical Reflections on Researching the Overrepresentation of First Nations Children in the Child Welfare System" (2018) 28: 1&2 J L & Soc Pol'y 10 at 30. Sinha, Delaye and Orav-Lakaski note that First Nations children may be overrepresented at every stage of the child welfare process (not only in the investigation stage of the child welfare system), but that research data is largely limited to the investigation stage of the child welfare system: at 30.

¹²⁶ Turner, *ibid*.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

than in the provinces.¹²⁹ Regarding the connection between foster care and confinement in prisons, Alison Cunningham and Linda Baker's report features a survey of women incarcerated in three Ontario prisons, and found that 21 per cent of incarcerated mothers' children were placed in foster care.¹³⁰ Yet this data is over fifteen years old, and sampled on a small scale.¹³¹ In the National Inquiry report, Kassandra Churcher, on behalf of Canadian Association of Elizabeth Fry Societies, reported that "[s]ixty-four per cent of incarcerated Indigenous mothers are single mothers ... [and] the primary caregivers for their children."¹³² Overall, while some numbers are known, data is not comprehensively collected, collated, or shared in a way that acknowledges or illustrates Indigenous communities' intergenerational experiences with state institutions. These experiences, only partially reflected by statistics, are also not well reflected in the literature on imprisonment.

B. LITERATURE

Literature on confinement in prisons makes some mention of the impacts of intergenerational incarceration on Indigenous Peoples generally. However, it lacks depth regarding the colonial experiences of Indigenous Peoples, and the links not only between confinement in prisons and confinement in other institutions (*e.g.*, residential schools, segregated hospitals, and the Sixties Scoop), but also between the forms of trauma produced by each site of confinement. Prior to the TRC and National Inquiry, RCAP examined Indigenous People's historical and contemporary experiences of justice in Canada, with the goal of better understanding Indigenous overrepresentation in prisons and jails. RCAP notes that societal factors, such as colonial trauma, play a key role in incarceration rates.¹³³ In *Bridging the Cultural Divide*, RCAP explains that the higher rates of both offending and incarceration among Indigenous people is linked to systemic discrimination based on racial and cultural prejudice, as well as socio-economic deprivation, substance abuse, intergenerational loss, violence and trauma, and under- or over-policing.¹³⁴ RCAP specifically situates colonialism—particularly, its manifestation in residential schools—as the key to understanding incarceration rates.¹³⁵ The report notes that the justice system “was never designed to address and redress the impact of the accumulated injustices of colonialism.”¹³⁶ Yet this detailed discussion and acknowledgement of colonialism does not appear to have been underscored in more recent academic literature on intergenerational incarceration.

¹²⁹ *Ibid.* Of all children aged fourteen and under in the territories, the proportion of Indigenous children was 96 per cent in Nunavut, 67 per cent in the Northwest Territories, and 33 per cent in Yukon.

¹³⁰ Alison J Cunningham & Linda L Baker, *Waiting for Mommy: Giving a Voice to the Hidden Victims of Imprisonment* (London, Ontario: Centre for Children and Families in the Justice System, 2003), online: <<https://web.archive.org/web/20170422210724/http://www.lfcc.on.ca/WaitingForMommy.pdf>> [perma.cc/5DX8-EVE6] at 7.

¹³¹ *Ibid.* at 6. Only women with children under eighteen years of age were asked to complete the survey, and in total, forty surveys were completed. The book was published in 2003.

¹³² National Inquiry, “Volume 1a,” *supra* note 2 at 637.

¹³³ RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996).

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* at 70.

I collected and examined studies and publications on the topic of intergenerational incarceration in Canada spanning twenty years (1998-2018), and found both a paucity of data available, and a lack of discussion on colonialism and intergenerational experiences in other places of imprisonment. The focus is largely on parents confined in prison and their children, with little attention to broader ripple effects throughout families and communities.¹³⁷ This literature does not fully speak to the institutional histories and historical trauma which precede the current situation of confinement today. Literature on incarceration and families in Canada suggests serious impacts of intergenerational confinement in prison and jail generally, yet it lacks sufficient depth regarding the experiences of Indigenous people and the link between confinement in prisons and both traumas and confinement sustained in other institutions. Nor is there adequate acknowledgement in this literature of the particular injustice of inflicting forms of imprisonment throughout generations—the immense cost, loss, and disconnection experienced repeatedly within families and communities.

A key study from the Canadian literature which does acknowledge and discuss connections to other institutions is by Ojibwe researcher, Marlyn Bennett,¹³⁸ for Indigenous organization Ka Ni Kanichihk, based on Treaty No. 1 Territory¹³⁹ in Winnipeg. Bennett's work is a significant advancement for featuring direct narrative inquiry with Indigenous people who have a personal and/or family history of intergenerational incarceration, residential schools, and/or child welfare system apprehension. Her report seeks to understand the impacts of incarceration in families, effects on new generations, and the intergenerational ripple-effects on Indigenous communities.¹⁴⁰ She argues that “foster and state homes, as well as jails, are the ‘new residential schools’ and have been found to have long-lasting intergenerational impacts for subsequent generations.”¹⁴¹ This report is unique in the Canadian context for situating discussion of intergenerational incarceration of Indigenous people firmly in relation to colonialism and prior institutional experiences, which is critical for developing long-lasting solutions. Such context is important to establish in advance of developing solutions, yet is not witnessed nearly enough in Canada.

¹³⁷ See e.g. Meredith Robeson Barrett, Kim Allenby & Kelly Taylor, *Twenty Years Later: Revisiting The Task Force on Federally Sentenced Women* (Ottawa: Correctional Service Canada, 2010), online (pdf): <www.csc-scc.gc.ca/005/008/092/005008-0222-01-eng.pdf> [perma.cc/7N4P-HDXU] at 46; Shawn Bayes, “Acknowledging and Reaching Children of Prisoners” (2007) 32:1 Canadian Child Study 9, online: <https://web.archive.org/web/20160811133723/http://elizabethfry.com/publications/docs/Children_of_Prisoners_CAYC_article.pdf> [perma.cc/4BXC-27KW]; Sarah Brennan, “Canada’s Mother-Child Program: Examining Its Emergence, Usage and Current State” (2014) 3:1 Can Graduate J of Sociology and Criminology 11; Cunningham & Baker, *supra* note 130; Amanda V McCormick, Hayli A Millar & Glen B Paddock, *In the Best Interests of the Child: Strategies for Recognizing and Supporting Canada’s At-Risk Population of Children with Incarcerated Parents* (Abbotsford: University of the Fraser Valley, 2014), online (pdf): <http://cjr.ufv.ca/wp-content/uploads/2015/05/Children-with-Incarcerated-Parents_Amended.pdf> [perma.cc/238X-D3AT]; Megan Vis-Dunbar, “Child Apprehensions in BC Correctional Facilities: Position Paper Presented to the Board of BCCLA” (10 November 2008), online: *British Columbia Civil Liberties Association* <<http://bccla.org/wp-content/uploads/2012/04/2008-BCCLA-Paper-Child-Apprehensions.pdf>> [perma.cc/7TSC-X6U7].

¹³⁸ Bennett, *supra* note 15.

¹³⁹ Traditional lands of the Anishinabe (Ojibwe), Ininew (Cree), Oji-Cree, Dene, and Dakota. Manitoba is the birthplace of the Métis Nation and part of the Métis Nation Homeland.

¹⁴⁰ Bennett, *supra* note 15.

¹⁴¹ *Ibid* at 15.

C. POLICY/LEGAL RESPONSES

The federal government has developed policies such as *The Aboriginal Continuum of Care* to respond to the high rates of incarceration among Indigenous people in Canada,¹⁴² yet these rates have increased since implementation.¹⁴³ Policy responses at the provincial and territorial level have also targeted the overrepresentation of Indigenous children in state child welfare institutions.¹⁴⁴ Most recently, the federal government created a national framework, *An Act respecting First Nations, Inuit and Métis children, youth and families*.¹⁴⁵ In this section, I provide a brief overview of the policy and legal landscape and then focus on policy reform, the TRC goals urging further reform, and the Indigenous Justice Program specifically. These are three places of prospective interest when seeking to break cycles of imprisonment. However, I argue that attempting policy responses under the current mainstream governance structures—including corrections, child-welfare, health, and Crown-Indigenous relations, among others—makes it impossible to take seriously and effectively address intergenerational imprisonment. That is because the colonial system inherently reproduces injustice through community disempowerment, top-down approaches, and continual iterations of solutions favouring confinement.

The Supreme Court has recognized the impact of colonialism and discrimination, including in social, historical, and economic domains, on Aboriginal Peoples, first in *R v Gladue*,¹⁴⁶ and reaffirmed in *R v Ipeelee*.¹⁴⁷ These court decisions require judges to consider social history and the legacy of colonialism when sentencing Aboriginal individuals.¹⁴⁸ In 1996, Canada introduced sentencing law reforms to the *Criminal Code* (section 718.2e)¹⁴⁹ that were intended to ameliorate the over-incarceration of Indigenous people. These reforms included “restorative non-carceral alternatives for offenders to serve their prison sentence in the community ... for up to two years” and what later became known as *Gladue* reporting, encouraging courts to consider social history such as residential schools in sentencing Aboriginal people.¹⁵⁰ The *Youth Criminal Justice Act* (YCJA) provides that extrajudicial sanctions may be available to a young person alleged to have committed an offence, if a warning, caution, or referral would be inappropriate.¹⁵¹ The Crown Prosecution Manual defines extrajudicial

¹⁴² Correctional Service Canada, “Indigenous corrections” (3 January 2017), online: *Government of Canada* <<https://www.csc-scc.gc.ca/publications/005007-3001-eng.shtml>> [perma.cc/YDC4-DHDW]; Department of Justice, “Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System” (17 October 2018), online: *Government of Canada* <www.justice.gc.ca/eng/rp-pr/jr/gladue/toc-tdm.html> [perma.cc/Q42A-M6XD].

¹⁴³ Malakieh, *supra* note 102.

¹⁴⁴ See e.g. Ontario Ministry of Children, Community and Social Services, “Ontario Indigenous Children and Youth Strategy”, online: *Government of Ontario* <www.children.gov.on.ca/htdocs/English/professionals/indigenous/index.aspx> [perma.cc/X687-4H53].

¹⁴⁵ *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

¹⁴⁶ *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

¹⁴⁷ *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

¹⁴⁸ Paula Maurutto & Kelly Hannah-Moffat, “Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts” (2016) 31:3 CJLS 451 at 456-457.

¹⁴⁹ *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

¹⁵⁰ Gillian Balfour, “Do law reforms matter? Exploring the victimization-criminalization continuum in the sentencing of Aboriginal women in Canada” (2012) 19:1 International Rev of Victimology 85 at 85.

¹⁵¹ *Youth Criminal Justice Act*, SC 2002, c 1, s 10(1) [*Youth Criminal Justice Act*].

sanctions as “non-court measures used to hold a young person accountable for criminal conduct.”¹⁵² The YCJA also places restrictions on remand (being held in prison awaiting trial)¹⁵³ and prison for young offenders,¹⁵⁴ limiting detention to situations where the young person has been charged with a serious and/or violent offence. It directs youth court judges to consider the alternatives to prison for Aboriginal young people at the sentencing stage.¹⁵⁵ These legislative and judicial developments have made restorative justice practices more available to Aboriginal youth and adult offenders in Canada, allowing for balanced attention to the offenders’ and victims’ experiences and healing processes.¹⁵⁶ However, in practice, restorative justice practices are under-used and under-available in Canada.¹⁵⁷

The literature offers analysis and critique of the outcomes of these policy reforms. *Gladue* principles are perceived by many Indigenous prisoners to be ineffective and inconsistently applied,¹⁵⁸ and incarceration rates have worsened since *Gladue* was implemented.¹⁵⁹ Gillian Balfour analyzed sentencing decisions and argues that “the potential of sentencing law reforms is realized unevenly across Canada ... and seldom on behalf of Aboriginal women” specifically.¹⁶⁰ She suggests that “sentencing law reforms are insufficient strategies” when the conditions of Indigenous women’s lives may be formed “by legacies of trauma and neglect.”¹⁶¹ Similarly, Carmela Murdocca argues that law reforms do little to tackle the complex social problems, such as violence, poverty, and substance abuse, resulting from government policies.¹⁶² Regarding restorative justice, Meagan Berlin argues that “practices are not sufficiently used and, in some cases, implemented inappropriately” (e.g., due to lack of resources).¹⁶³

Indigenous people’s complex history and continuing lived experiences are not adequately acknowledged nor centred in policy responses. Further attention is needed to develop policy approaches that will centre these complex social histories and ongoing realities interconnected

¹⁵² Government of Ontario, “Crown Prosecution Manual: 37(a): Youth Criminal Justice – Extrajudicial sanctions” (14 November 2017), online: *Government of Ontario* <www.ontario.ca/document/crown-prosecution-manual/37-a-youth-criminal-justice-extrajudicial-sanctions#:~:text=The%20Youth%20Criminal%20Justice%20Act,person%20accountable%20for%20criminal%20conduct.&text=In%20appropriate%20cases%2C%20young%20persons,necessity%20of%20formal%20judicial%20proceedings.> [perma.cc/R5YQ-EFN5].

¹⁵³ *Youth Criminal Justice Act*, *supra* note 151, s 29(2).

¹⁵⁴ *Ibid*, s 42(2).

¹⁵⁵ Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law: Third Edition* (Toronto: Irwin Law Inc, 2012) at 74. See also *Youth Criminal Justice Act*, *supra* note 151, s 38(2)(d).

¹⁵⁶ Meagan Berlin, “Restorative Justice Measures for Aboriginal Offenders: Developing an Expectation-Led Definition for Reform” (2016) 21 Appeal 3 at 6.

¹⁵⁷ *Ibid* at 9-10. There is only one *Gladue* court in Canada, in Toronto: at 9. *Gladue* reports are under-produced, and not expected or demanded in many cases: at 10.

¹⁵⁸ Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (Ontario: Ministry of the Attorney General, 2013), online (pdf): <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html#top> [perma.cc/7DBM-7SM5] at 316.

¹⁵⁹ *Ibid* at 222.

¹⁶⁰ Balfour, *supra* note 150 at 86.

¹⁶¹ *Ibid*.

¹⁶² Carmela Murdocca, “From Incarceration to Restoration: National Responsibility, Gender, and the Production of Cultural Difference” (2009) 18:1 Soc & Leg Stud 23; Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013).

¹⁶³ Berlin, *supra* note 156 at 3.

with criminalization. There are two major paths available aside from maintaining the status quo of high rates of intergenerational incarceration: the first is to reform existing policy; the second is more transformative change.¹⁶⁴ The TRC urged the latter, through the development of Aboriginal-led justice initiatives.¹⁶⁵

The TRC is an important form of political response in Canada, which is still being actioned and interpreted within institutions. The TRC's report, *Honouring the Truth, Reconciling for the Future*,¹⁶⁶ explains that the Commission was constituted and created in 2008 by the Indian Residential Schools Settlement Agreement, and spent several years travelling throughout Canada to hear testimony "from more than 6,000 witnesses, most of whom survived the experience of living in the schools as students."¹⁶⁷ In addressing the legacy of residential schools in Canada, the TRC emphasized several areas of justice where attention is needed, including issues of incarceration¹⁶⁸ and child welfare.¹⁶⁹ Significantly, the TRC urged action in addressing the overrepresentation of Indigenous youth and adults in the justice system by supporting the implementation of Aboriginal-led justice systems.¹⁷⁰ Similarly, the TRC called on all levels of government (including Aboriginal governments) to commit to reducing the number of Indigenous children in the care of state child welfare authorities,¹⁷¹ and on the federal government to enact legislation affirming "the right of Aboriginal governments to establish and maintain their own child-welfare agencies."¹⁷² These Calls to Action move beyond reform to more transformative change, an approach also centred by RCAP twenty years prior.¹⁷³ The National Inquiry has an extensive agenda of recommendations, including Call for Justice 5.21, which calls upon the federal government to implement the recommendations of the TRC and the Arbour Report, among other reports.¹⁷⁴

The following recommendation (Call to Action # 42) of the TRC is especially important in terms of transformative change:

We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.¹⁷⁵

¹⁶⁴ RCAP *supra* note 133.

¹⁶⁵ See e.g. Calls to Action #42 & #50. TRC: *Calls to Action*, *supra* note 5 at 4-5.

¹⁶⁶ TRC: *Honouring the Truth*, *supra* note 25.

¹⁶⁷ *Ibid* at v.

¹⁶⁸ See Calls to Action #30-38. TRC: *Calls to Action*, *supra* note 5 at 3-4.

¹⁶⁹ See Calls to Action #1-5. *Ibid* at 1.

¹⁷⁰ See Calls to Action #42. *Ibid* at 4.

¹⁷¹ See Calls to Action #1. *Ibid* at 1.

¹⁷² See Calls to Action #4. TRC: *Calls to Action*, *supra* note 5 at 1.

¹⁷³ RCAP *supra* note 133.

¹⁷⁴ The National Inquiry, "Executive Summary," *supra* note 1 at 72. The Arbour Report was produced in response to violence at the Prison for Women (P4W) in April 1994. The Government appointed Madam Justice Louise Arbour to conduct an investigation into those incidents and CSC in April 1994. Louise Arbour, *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Solicitor General Canada, 1996), online (pdf): <www.caefs.ca/wp-content/uploads/2013/05/Arbour_Report.pdf> [perma.cc/E52A-DQEV].

¹⁷⁵ See Calls to Action #42. TRC: *Calls to Action*, *supra* note 5 at 4.

Expanding and committing to Indigenous-led, -controlled, and -owned justice systems is critical for ensuring different outcomes than the current mainstream approach, as these systems more appropriately account for the histories of trauma experienced by Indigenous individuals, families, and communities in contact with the justice system in Canada. Speaking from a Mohawk perspective, Monture explains that traditional First Nation structures of justice are based on cooperation and consensus.¹⁷⁶ Monture notes, “[w]hen difficulties arise within a community, the community responds by attempting to bring the person who is the source of the difficulty back into the community The aim and the result is to restore balance in the community and the collective’s rights are the focus.”¹⁷⁷ This stands in contrast to settler colonial justice systems, the dominant structures in place, which focus on the individual, and center an adversarial and punitive model.¹⁷⁸ The intent is not to reproduce the current corrections model under Indigenous leadership, control, and ownership, but to transform structures of justice.

There is an existing program which seeks to further Indigenous-led justice: the federal government’s Indigenous Justice Program.¹⁷⁹ This program has operated since 1991, offering cost-shared support (with provincial/territorial governments) of Indigenous community-based justice services by (1) establishing alternatives to mainstream justice processes (*e.g.*, restorative justice), and (2) funding capacity building within these services.¹⁸⁰ The services supported by this program “are designed to reflect the culture and values of the communities in which they are situated.”¹⁸¹ Objectives of the Indigenous Justice Program include:

to assist Indigenous peoples in assuming greater responsibility for the administration of justice in their communities; to reflect and include Indigenous values within the justice system; and, to contribute to a decrease in the rate of victimization, crime and incarceration among Indigenous people in communities with community-based justice programs funded by the IJP.¹⁸²

There are, however, several ways in which the Indigenous Justice Program could be improved. The federal government states that it funds one hundred and ninety-seven community-based programs that serve over six hundred and fifty communities.¹⁸³ Yet there are large gaps in service across the country;¹⁸⁴ for example, Indigenous Justice Program initiatives are only run in

¹⁷⁶ Monture, *supra* note 12 at 6.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Department of Justice, “Indigenous Justice Program” (16 December 2019), online: *Department of Justice* <www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html> [perma.cc/46S5-VKBC] [Justice, “Indigenous Justice Program”]. Originally called the Aboriginal Justice Program. See *e.g.* Department of Justice, *Evaluation of the Aboriginal Justice Strategy: December 2016* (Ottawa: Department of Justice, 2016), online: (pdf): <www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/ajs-sja/ajs-sja.pdf> [perma.cc/KT73-MVHB] at 3-4 [*Evaluation of the Aboriginal Justice Strategy*].

¹⁸⁰ *Evaluation of the Aboriginal Justice Strategy*, *ibid.*

¹⁸¹ *Ibid* at 3.

¹⁸² Justice, “Indigenous Justice Program,” *supra* note 179.

¹⁸³ Department of Justice, “Community-Based Justice Fund” (17 February 2020), online: *Department of Justice* <www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html> [perma.cc/CR8V-8BAM].

¹⁸⁴ *Evaluation of the Aboriginal Justice Strategy*, *supra* note 179 at 25.

a limited number of communities in Canada.¹⁸⁵ In addition, there are gaps in connecting people who may benefit from these services, namely issues with the referral of individuals from the courts and police.¹⁸⁶ Community-based justice services are often dealing with increasing caseloads without adequate funds to operate optimally.¹⁸⁷ The capacity-building funding stream of the program is not accepting applications, and has not done so since April 2016.¹⁸⁸ Further, in order to ensure resilient peoples, communities, and nations, these programs must focus on healing the harm sustained over generations of colonial violence. Ojibwe scholar Ashley Quinn notes that “[c]ommunity members have stated that healing work needs to be intimately aligned to relationships with Elders and other cultural leaders, as well as ceremonies and protocols designed for personal development.”¹⁸⁹ The emphasis of the official Indigenous Justice Program mandate is differentially placed on crime and victimization, rather than healing. Lastly, the top-down approach of the program is not ideal, as the federal government selects, approves, and evaluates this work, which raises questions regarding the full autonomy of Indigenous-led projects. Robust funding, supporting capacity building, and having meaningful conversations and action regarding autonomy and healing within this initiative may be one promising route to improve the program.

Nevertheless, even with improvement, the Indigenous Justice Program is still operating within the overarching colonial system, and is ultimately funded and controlled by the federal government. Improvements to the program could address some of the gaps in place, yet not enough to truly break cycles of intergenerational imprisonment perpetuated by prior and ongoing policy and intervention. Expanding community justice programs offers potential, yet broader change is required, which is highlighted in the TRC recommendations. Changes are needed to the deeper conditions of people’s lives—housing, education, physical and mental health, substance use, trauma, family disunity, poverty, autonomy and self-determination, rights over territory, racism and discrimination, domestic violence, sexual violence, policing, health of the land, water, and air—and acknowledgement that policy and choices made today will impact on the seven generations to come.¹⁹⁰ These are broad and deep changes that cannot be attained through the development or improvement of one program. As Sugar and Fox say, “No amount of tinkering with prisons can heal the before-prison lives of the Aboriginal women who live or have lived within their walls.”¹⁹¹ In essence, attempting a policy response under the current colonial

¹⁸⁵ To see the location of all the programs in Canada as of 2015, see Department of Justice, “Location of Aboriginal Justice Strategy Programs in Canada” (7 January 2015), online: *Department of Justice* <<https://web.archive.org/web/20190418062739/https://justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplac/index.html>> [perma.cc/N3WB-W8ET, screenshot view].

¹⁸⁶ *Evaluation of the Aboriginal Justice Strategy*, *supra* note 178 at iv, 33-36.

¹⁸⁷ *Ibid* at 41.

¹⁸⁸ Department of Justice, “Capacity-Building Fund” (16 December 2019), online: *Department of Justice* <www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-fc/index.html> [perma.cc/4Q49-JDDK]. See Department of Justice, “Capacity-Building Fund” (19 June 2017), online: *Department of Justice* <<https://web.archive.org/web/20180731232410/https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-fc/index.html/>> [perma.cc/4C52-ST9H, screenshot view] for information regarding the last call for proposals in 2016.

¹⁸⁹ Ashley Quinn, “Reflections on Intergenerational Trauma: Healing as a Critical Intervention” (2007) 3:4 *First Peoples Child & Family Rev* 72 at 75.

¹⁹⁰ “Seven generations” is a Haudenosaunee belief that the actions and decisions made today will impact the generations to come. James R Moran & Marian Bussey, “Results of an Alcohol Prevention Program with Urban American Indian Youth” (2007) 24:1 *Child & Adolescent Social Work J* 1 at 5.

¹⁹¹ Sugar & Fox, *supra* note 11 at 469.

structures makes it impossible to take seriously and effectively address intergenerational imprisonment. The system itself reproduces this injustice. The keys, so to speak, need to be handed over to communities to ensure truly transformative change. This means that the state must move out of the way of Indigenous leadership, ownership, and control.

IV. CONCLUSION

Imprisonment is a harmful tool that has been used in different ways against Indigenous Peoples throughout colonial history. Confinement in prisons follows in the footsteps of other forms of removal of Indigenous people from their communities, including residential schools, segregated hospitals, the Sixties Scoop, and ongoing child welfare system apprehensions. There is possibility for moving towards an improved future; acknowledging and integrating an understanding of the ripple effects of policy and legacies of institutional confinement is necessary to move towards an improved future. Such context must be acknowledged, and perpetuation of harm among relations must be specifically addressed, yet through broader change than what is possible through any one program. The state should follow the TRC's recommendation for the establishment of Indigenous-led justice systems, and place emphasis on intergenerational healing. We must hand over the keys to communities, without the expectation that communities reproduce the processes and structures we currently embrace.